IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WALLACE J. DESMARAIS, JR.,)
)
Plaintiff,) C.A. No. 15-01226-LPS-CJB
)
v.)
)
FIRST NIAGARA FINANCIAL)
GROUP, INC.,)
)
Defendant.)

Wednesday, February 24, 2016
9:30 a.m.
Courtroom 2A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States District Court Judge

APPEARANCES:

FARUQI & FARUQI, LLP
BY: JAMES R. BANKO, ESQ.
BY: DERRICK B. FARRELL, ESQ.

Counsel for the Plaintiff

APPEARANCES CONTINUED:

RICHARDS, LAYTON & FINGER, PA
BY: SARAH ANNE CLARK, ESQ.

-and-

SULLIVAN & CROMWELL, LLP
BY: LAURA KABLER OSWELL, ESQ.

Counsel for the Defendant

THE COURT: Everyone, before we get started, let me just say a few things for the record. The first is that we're here today in the matter of Desmarais versus First Niagara Financial Group, Incorporated, et al. This is civil action number 15-1226-LPS-CJB here in our court. We're here today for argument on Plaintiff's motion for expedited discovery.

Before we go further, let me have counsel for each side introduce themselves for the record and let's start with counsel for Plaintiff's side and beginning with Delaware counsel.

MR. FARRELL: Good morning, Your Honor. Derrick Farrell from Faruqi & Faruqi for the Plaintiffs and with me is my colleague, Mr. James Banko.

THE COURT: Okay. Welcome.

MR. BANKO: Thank you.

THE COURT: And counsel for the Defendants.

MS. CLARK: Good morning, Your Honor. My name is Sarah Clark from Richards, Layton & Finger here for Defendants. With me at

counsel table is Laura Oswell. We entered our pro hac papers. They have not yet been granted, but with your permission Ms. Oswell will be doing today's argument.

THE COURT: I'll grant that permission for today's purposes. I'm sure that will come through shortly.

Counsel, I know I've allocated 30 minutes per side for argument on the motion and since it's Plaintiff's motion, I'll have them go first. And after we've finished that we have some logistical issues in the case as well before we're finished, but who will be speaking for Plaintiff's counsel today?

MR. FARRELL: I will, Your Honor.

THE COURT: Okay. Let's have Plaintiff's side come forward and I'll let you make your presentation and I may have some questions for you as well.

MR. FARRELL: Sure. Before the Court today is a very narrow issue of whether the PSLRA discovery stay should be lifted or produce a very finite set of documents that have already been produced to the Plaintiffs in a

related action that is pending out in the State of New York, New York State Court that asserts breach of fiduciary duty action as opposed to here where we have securities law claims.

THE COURT: So Mr. Farrell, just to be clear about it. The documents you're asking for, these are the documents that have been produced in the New York State action, that is the six actions in New York State, and not necessarily any documents produced in the Delaware action?

MR. FARRELL: Yes. My understanding based on reviewing the records and defense counsel will have to inform us as to what specifically is going on, is that nothing has been produced to my knowledge so far in the Delaware action where there's, as you mentioned, only one being filed, but there have been documents produced in the New York action, which I believe are the core documents such as board minutes and banker books which are highly relevant to our disclosure claims.

THE COURT: And how many documents are we talking about that have been produced in

the New York State actions?

MR. FARRELL: Unfortunately I don't know the specific number at this point, so I'd have to confer with defense counsel.

THE COURT: So to the extent your motion talks about a limited production or a particularized productions, when we're talking about the number of documents you don't know whether that's a hundred or a million pages or something in between?

MR. FARRELL: Currently no, but I would suspect it's relatively small, which is customary in these cases.

THE COURT: Sure. Let me let you continue.

MR. FARRELL: Sure. There are essentially three key issues here. The first is whether we have met our burden under the PSLRA that the stay should be lifted. Defendants also argue that discovery is not appropriate currently under Rule 26, but I think the key issue here relates to the PSLRA discovery stay and I intend to focus on that first unless Your Honor has any questions.

THE COURT: Just so no dispute really that it's the PSLRA discovery stay provisions and the ability to get over that is a stricter standard, a higher hurdle, than a reasonable test, for example, to overcome Rule 26 prescription on early discovery, that's the one you need to focus on. If you can get over that, presumably you can get over the Rule 26 related hurdle, am I right?

MR. FARRELL: Yes, that's exactly my view, that because the hurdle is higher on the PSLRA issue, it makes sense to focus on that. If that is satisfied, then I think Rule 26 is equally satisfied.

THE COURT: Okay.

MR. FARRELL: The second issue I want to focus on is what I'll call the scope and materiality issue. And I'll walk through some of the key disclosure issues and explain why the documents we believe were produced in the New York action are relevant to those disclosure issues.

And then finally I want to address what I'll refer to as the laches argument that's

put forward by Defendants. Now, Defendants routinely refer to the discovery stent of the PSLRA that a stay is only lifted under extraordinary circumstances, they use that language throughout the brief. But I think it's important to focus on the language that's actually used in the statute. And the PSLRA says that in any private action arising under this chapter, all discovery in other proceedings shall be stayed during the pendancy of any motion to dismiss, unless the Court finds on the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. And what the case law teaches us is that the irreparable harm standard is actually a higher standard than undue prejudice. I think it's important for the Court to note that it's quite well established that where there is an uninformed vote, that leads to irreparable harm. So I think it's quite easy that because we've alleged material disclosure claims, that we meet the undue prejudice standard because I think we meet the even higher irreparable harm standard.

And one of the key cases we rely on is the Enron decision out of the Southern District of Texas and their documents have been produced in a related action. The Plaintiffs asked for them to be produced in the securities action and they pointed out that the PSLRA discovery stay was intended to prevent fishing expeditions and it was not designed to keep secret from counsel in securities cases documents that have already become available for means other than in the securities case. And as here, the Defendants there claim that because the motion to dismiss has been filed, the Court should strictly adhere to the PSLRA discovery stay and not produce documents that already have been produced in the other case. And the Court disagreed with Defendants there and held quote, in a sense this discovery has already been made and is merely a question of keeping it from a party because of the strictures of a statute designed to prevent discovery abuse. And then thereafter required the documents be produced.

Similarly in Kneiting, they actually were produced in another case. It was

a preliminary injunction motion and the Court required what I would call that the core documents to be produced, those were the banker books, the board minutes, things of that nature that are routinely produced in this case and lifted the stay. So there we weren't with the situation where documents had already been produced and all you have to do is copy a CD, but rather actually going and collecting documents and producing them. Because again there is undue prejudice here because of the irreparable harm that would result from an uninformed vote.

Now Defendants point to a number of cases where documents had already been produced in another action and the Court refused to lift the discovery stay. One of those is the American Funds securities litigation from the Central District of California. And one important issue there is that the Court found no undue prejudice that would result from the documents not being produced, because they have been produced to a government agency, presumably they wouldn't be lost and there were no

disclosure issues. So again, we don't have the irreparable harm situation that we have here.

Fannie Mae was also similar. And in that case the Plaintiffs sought production of documents that had been produced to a government entity and the Court again refused to lift the stay because there wasn't a disclosure issue, there wasn't risk of the documents either being destroyed or some sort of irreparable harm that result from an informed vote.

THE COURT: Sounds like what you're suggesting is that in just about any case in which there has been a prior state court production and in which a plaintiff like you makes a claim on the PSLRA, it's going to be either followed up with a PI motion or a PI motion has already been filed, in just about any case there would be undue prejudice. Is that right? I mean is what you're asking for kind of almost a de facto rule that just about any case like this under these circumstances undue prejudice has been met and the docs would have to be produced?

MR. FARRELL: I wouldn't say every

case, because we still have to show our burden that we stated the claim, right? So it's not as though we simply file the claim and we automatically get discovery. We still have to show there's an underlying disclosure issue under federal securities laws.

THE COURT: We're not even there yet, right? I mean, we're not even going to get to have you stated a claim, is their motion to dismiss valid? We're not going to get there for a while. So I guess I'm trying to figure out, you know, you see the cases with regard to undue prejudice and you know, some, as you say, like Kneiting or Kneiting, and the Enron case go one way and then cases that the Defendants cited, including the ones you mentioned, but also particularly cases like Lusk and Dimple, they go the other. And I'm trying to figure out, is what you're suggesting that there's a particular factual scenario going on here that makes this case maybe a little different than some and shows that we've got undue prejudice here in a matter that wouldn't necessarily be the case in just about any kind of procedural situation like

ours? Or no, is it basically any case that kind of fits our procedural situation you're going to get the docs and undue prejudice is going to be shown?

MR. FARRELL: Well, I think you need to be able to show, as I mentioned, that you actually have some sort of disclosure issue and I want to go through some of the crucial disclosure issues and why it's relevant here. One thing I'll point out like in Dimple, as you mentioned, one of the reasons the Court denied was there was form shopping going on, because the Plaintiff's action filed in State Court initially and then chose after the fact to go to Federal Court. And so that's factually different. And the Lifetime Fitness case there was not a situation where one plaintiff group was getting ahead of the other plaintiff's group. That's what we have here where the New York plaintiffs are getting ahead of us. And Lifetime Fitness, that's the 2015 District of Minnesota case. I believe that is Lusk. I don't have the plaintiff name in front of me.

But I'd like to kind of focus on

some of these disclosure issues to help Your Honor understand what we're focused on here is one of the things they do in the proxy is they disclose the range that was -- of indication of interest by potential purchasers. You had KeyCorp, Party A and Party B. And the range they list is $10 to $11.50. At the end of the day, though, they get to an implied value, because this is a cash of stock transaction of $11.50, so 10 cents under their range. But we don't know if KeyCorp was at the top, Party A was at the top, Party B was at the top. Whether only one as at $10 and maybe two were at $11.50. And the case lase is very clear, and especially in Orchard, granted it's stay for a chancery decision, but they do require the disclosure of the specific indications of interest. And that's very important for stockholders to understand, because if Party B was the one offering $11.50 but they chose not to do it, then this range is kind of misleading because when you look at it you think oh maybe it was KeyCorp because they got to the highest number at the end of the day.

And where is that information going to be? It's going to be in the board minutes or presumably it's going to be in the banker books and those are documents that we want. The other thing --

THE COURT: In other words, am I right that you think among the documents that have been produced in the New York State actions are going to be documents that would further flush out the nature of the claims you're making in your complaint; is that right? In other words, you're alleging that certain information that should have been included was omitted in the particular proxy statement you focus on and then perhaps the definitive proxy statement too, and you'd like to get your hands on information that fills in some of those factual blanks to help support your preliminary injunction motion that's forthcoming; is that right?

MR. FARRELL: Right. We're trying to prepare for the preliminary injunction motion, but it's more than just that it was omitted. I believe the information is necessary in order to make the existing statements not

misleading, which is important for a Section 14A claim. And so, my focus here is on the preliminary injunction motion, that's why there's irreparable harm, because it's very difficult to fashion a damages remedy for a disclosure violation. In some instances the Court of Chancery has used the approach of a quasi appraisal remedy, but that's not well established in the Federal Courts and it's very, very difficult to say what is the loss associated with not knowing the offer prices. I don't even know where to begin on that. And that's why it's important that be addressed at preliminary injunction phase. And again we're seeking a very narrow set of documents that should have no burden on Defendants to produce.

THE COURT: I guess, you know, when I asked you what kind of makes this case different than maybe lots of other cases that might, that may fall into this same procedural scenario, the thing you said a couple times is well, we still have to show or demonstrate that our claims, you know, that our claims of misleading or the disclosures or disclosures

that omit information, I forget the word you used, but I think the gist was, we have to show that our claims had some basis to them. And I guess what I'm asking is, you know, we're at a procedural stage in which I won't be making that call. I won't be determining before I decide as to whether you get expedited discovery or even perhaps before a preliminary injunction motion is actually fully teed up. I won't be deciding at this stage when I'm considering your expedited discovery motion whether or not those claims do have basis. For all I know, they might ultimately be, a motion to dismiss might ultimately be granted here. I guess my question is, how am I supposed to tell that this is a kind of case where your claims have basis when I'm not going to be going through the motion to dismiss process that the PSLRA contemplates happens in a case?

MR. FARRELL: I think that's where Rule 26 comes into play, because Rule 26, one of the factors they do look into in whether to grand expedited discovery is whether you stated an underlying claim. So I do think that would

be something appropriate for the Court to consider, because there are kind of two issues here; one, should the discovery stay be lifted, but then we also do have to get past Rule 26 still. But I think the discovery stay standard of the PSLRA is very high. But to the extent Your Honor has concerns about not being able to look into it, I think that's perfectly appropriate under Rule 26 for the Court to do. So you know, to Your Honor's concern that what if these don't have any merit to them, I think you can look at that now and consider that as a factor, and that's why I'm going to talk about some of these, what I view as important disclosure issues in this case.

THE COURT: And before we get there, let me just make sure I understand. You're suggesting that the Rule 26, the process for deciding whether or not discovery should be expedited pursuant to the restrictions of Rule 26 would have me, depending how likely I am, to ultimately be determining whether there's merit to these allegations in the complaint?

MR. FARRELL: I believe that's one

of the factors that is considered and evaluated under Rule 26 and I believe that's also pointed out in Defendant's brief. Give me one moment.

THE COURT: I just want to make sure I know which portion of the test as to Rule 26.

MR. FARRELL: Sure.

THE COURT: I mean, for example, on Page 12 of the Defendant's brief, they reference the reasonableness standard, the second test, which I said I think is the appropriate test to use in these circumstances, not the Natarro test. And they consider factors as to whether there's a preliminary injunction hearing, what's the need for discovery and what's the breadth of the party's request. And I'm just not sure I'm understanding --

MR. FARRELL: Sure. What I'm referring to is on Page 12 of the Defendant's brief and it's referring to the Natarro test. And looked at four factors, the first is irreparable injury, the second being some probability of success on the merits.

THE COURT: Okay. I understand.

MR. FARRELL: So that's what I'm referring to there. And they talk about it in their brief in the context of Rule 26, Section F specifically.

THE COURT: I get it. In a previous decision I have determined that I don't think the Natarro test is the appropriate test under these circumstances in Rule 26 that should be a reasonableness test, but I see where you're pointing to. I got it. That's a decision on a case called Kone from I think 2011. Okay. Lastly, before I let you move on, you mentioned I think one of the issues that Defendants raise, which is look, there are going to be other remedies here for shareholders of the kind the Plaintiff represents, one of them is the appraisal process through Section 262, I think it is, of the Delaware corporation law. Isn't that a remedy that a shareholder to descents as to the merger could pursue in state court?

MR. FARRELL: Certainly appraisal is one remedy that can be pursued, but that assumes that stockholders have sufficient

information to determine whether to pursue that remedy. And one of the things you need to know in determining whether to pursue that remedy is well, was the process sufficient, because the Court Chancery in several appraisal decisions including the Ancestry decision very recently by Vice Chandler Glascock. He considered the transaction process, but several others have as well. But it's also important to look at the banker analysis, understand it fully in order to say hey, I think this deal's undervalued or it's not. So you need to get past the first hurdle of being sufficiently informed so you can decide whether to exercise those appraisal rights.

THE COURT: I guess that shareholder, presume this case moves forward and presume it's meritorious enough to get past the motion to dismiss stage, here we're going to have discovery produced in a case. And presumably shareholders, I mean shareholders that are participating in such state court actions, they're are going to be the ability, right, to have that kind of information in some way and use that through this appraisal process,

aren't they? Isn't that another option that they have, a way to seek redress other than through using this kind of discovery vis-a-vis your preliminary injunction motion?

MR. FARRELL: Well, see if I can hopefully answer Your Honor's question fully. Again, my point here is that they need to have the information to decide whether in the first place to seek appraisal. Because remember, under the appraisal statute, you're not guaranteed the transaction price. You're running the risk of getting below the transaction price and that's happened in not so recent decisions, so you need to be fully informed in deciding whether to seek appraisal. And some of these issues that we're raising go specifically to the company's value in the banker's analysis. One of those is with the inconsistent use of multiples. And one of the things they do is they do a comparable company's analysis. You look at the other companies, look at the multiples they are trading at and you compare it to the target and you come up with a value based on that.

In the discounted cash flow analysis, throughout the perpetuity period, there are two different models you can use. One is called the Gordon growth model, where you apply a specific growth rate into perpetuity, that's a projection period you're valuing the company. The other one you can use what's referred to as terminal multiples. And often times what bankers do in determining those multiples, what they usually do is look at the comparable company's analysis and they will import those multiples and use that during the terminal period for the DCF analysis. But here, for unexplained reasons, they used a lower number which lowered the DCF value than what they used for the comparable companies. And so the bankers need to disclose, so the stockholders can be fully informed, why they did that inconsistent usage.

The other thing that stockholders are denied are projections for the buyer. This is a cash and stock transaction. Without the projections for the buyer, you don't know what the buyers, you know, real value is and we know

that the buyer's financial advisor did, in fact, receive projections, so there's a vacuum information there.

THE COURT: I guess all I'm asking about this line of questioning is, I'm trying to determine other bases of relief. If I'm an aggrieved shareholder, if I believe I really have I don't have it and didn't see in this preliminary proxy statement and ultimately the definitive proxy statement information that I should see, that I should know, that I should have the ability to consider before I make an informed choice on this important merger decision, one way to effectuate that shareholder's rights would be to, I suppose, to grant you expedited discovery here, presumably some of the information or a lot of it that you're seeking is in fact found in the discovery that's been provided in other State Court actions. On behalf of this representative shareholder, you can file a preliminary injunction motion and that if successful that could stop the merger. But I'm asking, let's say that doesn't happen. Merger goes through,

but I'm an aggrieved shareholder, I don't think the merger should have gone through. What options do I have? Do I have other options for redress? Isn't it possible that ultimately I will get my hands on these kinds of documents you're talking about and I would be able to use some of those documents through the Section 262 process that the defense described or isn't it possible that in this very case, again, let's say the preliminary injunction motion is denied, but aren't you seeking other remedies, remedies with respect to damages and remedies with respect to decision. Aren't those other options that an aggrieved shareholder would have other than getting the expedited discovery now and trying to win a preliminary injunction motion based on that discovery?

MR. FARRELL: Sure. I guess you could say there are three different avenues. One is in this Court. Yes, you're right. We do have the complaints. There are damages claims, but I believe, as I've pointed out in the case law, proving damages is going to be very, very difficult in a disclosure case. Another avenue

they have is the Future Lou litigation that's going on in the State of New York and also in Delaware, but that's a different standard, because in order to obtain money damages you're going to have to overcome 102(b)(7) and show bad faith at the end of the day. You know, unless someone gets creative with other arguments that would somehow get around 102(b)(7), but I'm not aware of them in that action. And the other action is appraisal, but again, the problem is they are not fully informed and they run the risk of getting below the transaction price. So I just think that the best option here is for this to be addressed at the outset and appropriately and then it can be dealt with disclosures. We don't have to get into a measure of damages. It's much more simplistic and the way certainly the Court of Chancery has repeatedly preferred it. And simply because there's -- let's say they are the same claims that happened in state and federal court, doesn't necessarily follow that the state court is going to deny relief and rather that the federal court is going to deny it and the other

court is going to grant it. And I'll point Your Honor to what I referred to as the MySpace case, often referred to as Intermixed Media at the time. And that was the Central District of California, and the case is Brown versus Brewer. It's 2010 US District Luxus, 60863. It's a 2010 decision. And there the federal claims actually went forward past summary judgment. My memory is it settled before then, but the state claims ended up going nowhere. They were appealed to an appellate court in California and were shot down. So it's certainly there are examples out there where federal claims have gone forward and state disclosure claims have not.

So I think it's important that, you know, we treat this as an independent case. And I think we have stated, you know, some real disclosure issues. Another one is to Your Honor's point about the appropriateness of another remedy is again the projections, because in determining whether to seek appraisal, it's very important that you understand how reliable the projections are. And there's plenty of cases that say well, the bankers projections are

far less reliable than what management does. But what the proxy says, says there's some projections that are done by management and then other times they use language that the projections were prepared at the direction of management, which these open the question for -- to make sure the statements aren't misleading, are there two sets of projections or did management create them or when I hear the language at the direction of management, that suggests to me there was some sort of banker involvement or third party, which if I'm the stockholder, I'm going to give less weight to those. So if you're trying to seek appraisal, you need to understand what weight to give them because at end of the day at the Court of Chancery, especially very recently has relied very heavily on discounted cash flow analysis and a key input to that is the projections and your assumptions during the perpetuity period, which we've also raised concerns about from a disclosure standpoint.

THE COURT: In an appraisal action of the kind that defense of cited, are there not

mechanisms for those pursuing it to obtain the kind of information that you're suggesting one would need to make an effective case?

MR. FARRELL: You can obtain it once you file, but once you get past the waiting period where you can get the deal price considered back again, you're running the risk of getting below the transaction price and you need to make that cost benefit decision up front. You know, a fully informed decision of hey, I want to seek appraisal versus you get in. And this happens in these cases all the the time where the company tries to walk away from the projections. I actually was on the defense side of a case one time where we successfully had some of the projections reduced downward based on a closer look. So if you're a stockholder trying to determine whether to seek appraisal, I think you need to understand how reliable those projections are so you can decide whether you want to seek appraisal or not or on the back end you're going to end up with a different projection set, because it wasn't reliable because a banker did it or whatever reason. And

here we need to understand the reliability of those projections and whether management did them or someone else.

THE COURT: I guess the background to some these questions about alternative remedy is, if the test was just, or if if we were dealing in a world in which it was just what's the most efficient way for a shareholder like the Plaintiff to get access to information through this federal case and to try to bring things to a head, that might be one thing. But I think, you know, underlying some of the decisions is the idea that look, in general. I'm summarizing, but the PSLRA says in essence in the main when these cases are filed, these particular kinds of federal cases are filed, we're not going to permit -- we're a little worried frankly about Plaintiffs filing these cases without already having a sufficient bases to overcome a motion to dismiss. So in the main we're not going to permit discovery, because we want to make sure that a plaintiff can get over that motion to dismiss hurdle. On this case, right, if you look at what's happened, you

filed, Defendant filed a motion to dismiss. You didn't answer it. Now, maybe there was some back and forth between counsel about there being extended briefing period, but we still don't have an answer from you as to that. But yet what you're doing here is trying to get the discovery that you're not entitled to in the main in this kind of case because the whole structure is meant to say can you get over a motion to dismiss. But why aren't you trying to do an end run around that, you know, we're going to get that anyway, because we're going to tell them we're going to file a PI motion and then we're going to ask for expedited discovery. Why isn't what you're doing, if I were to grant your motion, basically permitting an end run around, you know, what Congress was trying to prohibit with the discovery stay provisions of the PSLRA?

MR. FARRELL: I don't think it's really an end run. If Your Honor's question is about answering a motion to dismiss, we're happy to respond as quickly as Your Honor wants if you believe that needs to be teed up.

THE COURT: Did you all discuss

before that your deadline for response to the motion to dismiss is that you would have an extended briefing period or did you all just not file a response as to the date it was --

MR. FARRELL: Unfortunately, I wasn't involved in those discussions, but I believe there was a request for an extension of time and that was granted by Defendants. But defense counsel, I assume she was involved in those discussions directly, I don't want to speculate.

THE COURT: Okay. You know what I'm asking. You know,it could seem like what you're trying to do is let's put off a decision on this motion to dismiss, which again the statutory structure kind of suggests in the main should happen first before discovery occurs. Let me trying to get discovery that I'm not otherwise entitled to in the case by way of this kind of procedural thing that you're attempting here. Why isn't that kind of end run around, I mean in the way that Dimple talked about, an end run around what the PSLRA is trying to accomplish?

MR. FARRELL: I mean, I think it's kind of a prisoner's dilemma here, in that you could flip it the other way and say well, if that's the law in all of these merger cases where they happen very quickly like, a tender offer, then you could never proceed to preliminary injunction motion simply because there's not enough time to brief the motion to dismiss fully and for Your Honor to write a decision on it. And so again, this is a narrow situation. This isn't a broad situation. We're seeking very narrow discovery that was already produced in another action, so we have other plaintiffs that are on unequal footing. And then add on top of it, I understand that Your Honor disagrees with the appropriate tasks, but I think it would be appropriate to look into the materiality of these disclosure issues and that would again provide another safeguard to the Court of, you know, is this really a fishing expedition or not.

THE COURT: And last question here is, and this I think goes to the question of well, you suggested look, there just wouldn't be

a mechanism otherwise. We couldn't get this expedited discovery in this format. You'd almost never have a chance to get it. I think the other side might say not necessarily. Look, there may be cases in which expedited discovery in these kind of circumstances are granted, but in those kind of cases the defendants say there were some different things happening, some extraordinary things. I mean cases like in re LeBranch, in re WorldCom. They pointed to courts that have distinguished those cases, saying they were case where in one of them, for example, where a court had ordered that parties including the parties seeking expedited discovery participated in expedited settlement discussions. And so almost necessarily in that circumstance, in order to fully participate in these court ordered settlement discussions you had to get the discovery to know what you're talking about. I think what the Defendants are actually saying is no, no, there are some circumstances, maybe rare, but some in which a Plaintiff like this Plaintiff could get this discovery early and right now it's just this

case doesn't implicate any of those. I guess what I'm wondering is it sounds like you disagree that this case doesn't have those kinds of circumstances present. I'm wondering what you think about the case makes them similar to cases like WorldCom and LeBranch.

MR. FARRELL: I think that what makes them similar is the irreparable harm issue that results from an uninformed vote. And to Your Honor's point, why didn't we respond to the motion to dismiss and why couldn't we have dealt with this earlier, there's a major procedural problem here that the law imposes. Defendants point this out in the brief. Here's the problem. Under Fara versus Blankenship, which is a Western District of Texas case, the Court held Plaintiffs can't state a 14A claim until the definitive proxy is filed. And they have argued that as a basis for their motion to dismiss. So here a preliminary proxy is filed on November 30th. We come in to Court, try to fight the motion to dismiss, we lose, because there's no definitive proxy under the law. So we're stuck waiting. And so we wait until

February 4th, very recently, right, that's when the definitive proxy comes out. Now we've got a vote date here that's coming up very soon, March 23rd. There's simply not enough time between February 4th and March 23rd to fully brief a motion to dismiss. And that's a situation that's repeatedly is going to come up in these cases. And then because the law makes us wait for a definitive proxy, we have to wait, but then once we wait, they say we're too late. So which is it. We lose if we file early, we lose if we file late. That shouldn't be the law.

THE COURT: Okay. Mr. Farrell, you're over 30 minutes. I'll give you five minutes of rebuttal.

MR. FARRELL: I'd appreciate that. Thank you.

THE COURT: Let's hear from Ms. Oswell from the other side.

MS. OSWELL: Good morning, Your Honor.

THE COURT: Good morning.

MS. OSWELL: Your Honor, I think many of the key points were covered in the

Plaintiff's argument, but just to be clear, there is nothing unusual or extraordinary about this case. This is one of many cases that Plaintiff's counsel and counsel like them file now every time a merger of any size is announced. And because of that, if Plaintiffs were to be successful here in overcoming the PSLRA stay, it would essentially change the rules of how the PSLRA applies.

And the fact is here Plaintiffs made several litigation decisions that have resulted in the situation they find themselves in now. First is they chose to file in Federal Court. They chose to file a federal securities claims. They know that the PSLRA applies to those claims and would present a challenge to them obtaining discovery. Then, we filed a motion to dismiss very early as the Court noted. We gave them every opportunity to respond to that motion to dismiss in order to move things along and overcome the limitations under the PSLRA of obtaining discovery. Counsel referenced the definitive proxy that's now been on file for over three weeks. Plaintiffs have

yet to file an amended complaint. So it is their decisions here that are causing the challenge that counsel identified, not the law and it's not undue prejudice. To find so would essentially be to find that in every case where a shareholder files what some would qualify as a strike suit under the federal securities laws that the PSLRA stay must necessarily be lifted. And that would be directly contrary to Congress's intent.

Now, as we just noted in our brief, this is a mandatory stay under the statute. And the first question that the Court must answer or must look to is whether the lifting of the stay is consistent with the statutes purpose. And as we -- as we heard from Plaintiff's counsel, what they are trying to do here is exactly what the statute says the Plaintiffs may not do. They are looking for information in order to substantiate their claims and as many courts around the country have found, when Plaintiff sues without the requisite information, that is exactly when the PSLRA stay is meant to apply. Indeed in the

Central District of California in the American Funds securities litigation case, the Court found that the attempt to use information in discovery to bolster claims is in direct contravention of one of the key purposes of the PSLRA stay. Moving on to the next question --

THE COURT: Actually, can we go back?

MS. OSWELL: Sure.

THE COURT: To get to some of what Mr. Farrell's concerns were and about timing really of the way these things might go. You know, it's -- let's assume you have a plaintiff who waits until the definitive proxy is filed which happened when?

MS. OSWELL: February 4th.

THE COURT: So February 4th. Relatively recently. It's going to be a shareholder vote less than two months later. Probably wouldn't be the case -- look, anything is possible, but a motion to dismiss would have to be, you know, severely, you know, truncated in order to have a decision before that vote. And what Mr. Farrell is suggesting, if you

didn't allow expedited discovery in at least some cases like this in advance of or consistent with the PI motion, you wouldn't -- you wouldn't be able to effectuate a decision here in this Federal Court case that might have the ability to put off that vote. What's your response to that? Is part of the response that well, look, we're not denying that someone could file a preliminary injunction motion in this kind of case and we're not denying even that in some circumstances expedited discovery in advance of that motion could be warranted, we're just not saying this is that case?

MS. OSWELL: Your Honor, that is the answer in this case. But more than that, I would say that that's exactly what the PSLRA means, that that is exactly what the statute says, that you don't get that discovery. And what you've heard from Plaintiff is, in fact, he doesn't actually need it. They've outlined in their brief and extensive footnotes and here today at argument, all the different things that they think are omitted from the proxy. And whether that is, those things are omitted and

they are required to be disclosed as a matter of law is a completely different questions. That argument is made irrespective of whether Defendants have that information or Plaintiffs have received that information. Those are arguments as a matter of law as to whether the information that Plaintiffs allege to have been improperly omitted was, in fact, omitted and was required to be disclosed. So it doesn't impact the preliminary injunction motion in the way the Plaintiff has described. But moreover, in this case we are not even close to there yet, because Plaintiffs have not filed an amended complaint based on the definitive proxy. In fact I believe the Plaintiff's counsel just admitted that there's no way the complaint that they have on file would withstand a motion to dismiss. So critically here we're not even at that stage. And it's difficult for Plaintiffs to credibly claim that they would be prejudiced somehow when they are ready to move forward with the preliminary injunction motion and where there are claims pending in another court addressing exactly the same disclosure issues that would --

that deal with this circumstance on behalf of the same class of shareholders.

THE COURT: And on that front, if we're talking about the New York State actions, for example, I mean, I was asking questions about like, for example, the documents that Plaintiffs are seeking, how many documents are we talking about?

MS. OSWELL: Your Honor, I don't have the exact number. I would tell you that Plaintiff's counsel is right. It's a very small number, somewhere between 15 and 20 documents. It's a narrowly described set of documents.

THE COURT: And you mentioned in essence the nature of the claims at issue in the state court proceeding, albeit different kinds of claims, you know, will tee up some of these issues and may tee up faster than they occur in this case in some ways. But wouldn't a part of your brief on the particularization front kind of tell me that these two kinds of claims, the Future View claims in State Court and these PSLRA claims are different and that I couldn't suggest that the kinds of docs that are going to

be sought here really might, in fact, be relevant to the Plaintiff's claims in this case?

MS. OSWELL: That's right, Your Honor. And let me explain the difference. So in terms of what is teed up at a preliminary injunction motion, those claims will be essentially the same. They will be was what was disclosed in the proxy adequate? Were the things that Plaintiffs alleged to have been omitted from the proxy, were they actually omitted and were they required to be disclosed? As I just mentioned, you don't actually need the documents to make that claim of omission. When these cases proceed or if they proceed past a preliminary injunction proceeding, the claims become very different. These are claims under the federal securities laws. And what -- not to jump ahead of ourselves, but what we've argued in the motion and what numerous courts have held is that these types of claims, these disclosure claims that are based on a merger that really amount to a breach of fiduciary duty don't really fit within the federal securities laws. But their case would be proceeding on the basis

of Section 14A, which is much different. Whereas, the state court plaintiffs, when they move forward, their cases proceed as a fiduciary duty claim subject to all the Delaware rules as Plaintiff's counsel described.

THE COURT: Would it be fair to say that as they proceed forward, the nature of the legal claims are of course different.

MS. OSWELL: Uh-huh.

THE COURT: The law regarding those claims might present different challenges in the different courts, but at base the question of sufficiency of information that's disclosed to shareholders is going to be an important component of both sets of cases.

MS. OSWELL: Yes. And especially at the preliminary injunction stage, which is actually a reason not to permit these Plaintiffs discovery, because those issues on behalf of the same class are being litigated actively in the New York State court. So there is no prejudice to Plaintiffs here. There may be prejudice to Plaintiff's counsel who have chosen this forum in these types of claims, but there is no

prejudice to the shareholder plaintiffs who are a member of the class.

THE COURT: Just so I understand, why is the nature of the claims going to be particularly similar as it relates to a preliminary injunction motion in this case and not necessarily to the ultimate decisions on the Section 14A claims that are at issue in the case?

MS. OSWELL: Because at the preliminary injunction stage the question that is being asked is whether the disclosure is adequate and I believe that would be the same, not to, you know, preview Plaintiff's motion, which may cover other things, but I would anticipate it would be the same disclosure issue as is briefed, what we briefed in the state court, because that is the basis on which you may obtain a preliminary injunction. The damages claims do not give rise to preliminary injunction.

THE COURT: It really is this irreparable harm issue. In other words, if we don't allow this disclosure, it could be harmed

by this pending vote.

MS. OSWELL: Right.

THE COURT: Once the vote is out of the way and this PI motion is out of the way, one way or the other the underlying legal issues in the case are going to focus more on sufficient, you know, for these omissions that were significant, are they misleading, et cetera.

MS. OSWELL: That's exactly right, Your Honor.

THE COURT: Okay. And I guess lastly, and I'll let you move on, it almost sounds like what you're saying on the flip side is, I can't think of any case in which a complaint like this is filed. And I say like this, let's assume we're talking about, take out the preliminary versus definitive proxy issue, and talk about a complaint, similar kinds of claims with regard to a proxy, sounds like you're saying I can't think of almost any case like this where a PI motion would be filed and a plaintiff would actually be entitled to expedited discovery. Is that what you're

saying?

MS. OSWELL: That's exactly right, Your Honor. We are aware of no case like this, this being a case based on a merger, disclosures made in connection with a merger where the stay has been lifted.

THE COURT: But we do know that there are some cases in the federal system where a PSLRA complaint is filed and expedited discovery is permitted. Now, you attempted to distinguish some of those cases. Do you want to walk through for me why you think the cases that have granted expedited discovery in advance of a decision on a PSLRA complaint are different than what you think the circumstances at issue here are?

MS. OSWELL: Certainly, Your Honor. They really fall into three categories. The first is where the Court has identified the prejudice. And this would include the case of WorldCom, where the Court was dealing with an underlying entity that was in bankruptcy. And multiple types of cases, so the securities claims, the ARISA claims, other claims were all

consolidated into a single action pending before Judge Coate in the Southern District of New York. And Judge Coate had ordered that all of those parties engage in coordinated settlement discussions. And again, against an entity with a finite number of resources in bankruptcy. And in that instance where the shareholder plaintiffs were being essentially ordered to settlement discussions with other plaintiffs who did have access to that discovery, the Court held that that was identified undue prejudice. But we should note that in that opinion Judge Coate said where is here plaintiffs are not in any sense engaged in a fishing expedition or an abusive strike suit and thereby do not act in contravention of the fundamental rationales underlying the PSLRA discovery stay and there is no undue prejudice the stay may be lifted. So the Court directly contrasted the situation we have here where we essentially have a strike suit to say this case is different, there's something special here and discovery is warranted.

Enron is a similar situation

although the opinion is kind of less, provides less explanation of the basis for lifting the stay. Again, a case where the underlying entity is in bankruptcy and the Court has before it several cases of different types, all consolidated, including the ARISA actions, where a bankruptcy stay has been lifted and the plaintiffs are entitled, other plaintiffs are entitled to discovery. In that case the shareholder plaintiffs are at a disadvantage because they're litigating a consolidated case with plaintiffs raising different claims who do have the discovery and the Court allowed discovery there.

THE COURT: So you'd say if I'm shorthanded in the distinction so far, in WorldCom we've got court-ordered settlement discussions in a consolidated case where not only is the case consolidated, but the party and the plaintiffs use here, is court ordered to participate in the settlement and doesn't have the same kind of documents that the other parties do. In Enron, sounds like what you're saying is at a minimum a consolidated case --

MS. OSWELL: Uh-huh.

THE COURT: -- in which the plaintiffs are at an imbalance as to other plaintiffs, not necessarily that the additional aspect of court-ordered settlement involved.

MS. OSWELL: Exactly right.

THE COURT: But that's the distinction.

MS. OSWELL: And I would note against an entity with the finite resources. So when you're a plaintiff seeking, raising claims against an entity that's in bankruptcy essentially, your resources are, or the availability of recovery is limited, because part of the estate, your dealing with insurers. It's a much different situation that we have here. Or you're litigating against a liquid entity who is about to be acquired.

THE COURT: I don't have Enron in front of me, but are you reading in some of those? I don't think I remember the Court necessarily explicitly distinguishing the decision based on those factors.

MS. OSWELL: Right. It's the

background of Enron. When you read the full opinion, I agree with Your Honor, the Court's discussion of lifting the PSLRA stay is rather abbreviated at the end of a long opinion about summary judgement and other issues, but understanding the background of Enron I think is critical to understanding why the Court would be willing to lift the stay there where it might not be appropriate in other instances.

THE COURT: Now, a case like Kneiting or Kneichting from the Southern District of Ohio, is your argument there basically, we think the case is wrongly decided or that it relied on pre-PSLRA decisions or is there some way you distinguish the result in that case other than it was wrongly decided.

MS. OSWELL: It's wrongly decided, Your Honor. It relies on a decision that predates the PSLRA stay where the consideration given to the undue prejudice was very minimal because they weren't dealing with the PSLRA stay. And when you read Kneiting, you see the Court kind of give the same short shrift to the undue prejudice question and to the motivations

of the Congress in enacting the PSLRA stay very much unlike kind of the majority of the decisions considering the PSLRA stay as such.

THE COURT: Also covering the issue in a case like Lusk, one of the issues, you know, in terms of determining whether there's undue prejudice that the Court focuses on is akin to some of your arguments here about other remedies that a plaintiff like the Plaintiff here and presumably the plaintiffs at this point who represent might have. Now, Mr. Farrell has talked about, for example, an appraisal process through Section 262, the ability to participate in state court actions alleging breaches of fiduciary duty, like the ones we've seen here, the ability to seek other kinds of remedies in this very federal case, that even if a preliminary injunction motion is denied, part of the response from Plaintiff's counsel is look, all of those options, sure, they are options, but they've all got lots of downsides to them, so they are not -- sure, there are other options, but they are not really comparable options. Do you want to talk

about -- is your response there, I disagree, actually I think they're great options? Or no, I may acknowledge they may be hurdles, that's not the point. The point is are there other avenues, and there are? Which are you arguing?

MS. OSWELL: Maybe a little bit of both. Those are other avenues. Those are avenues that are available to these plaintiffs here. And moreover, Plaintiffs have made the choice to be in federal court where they knew a stay would apply. If they wanted to litigate a case where they could have access to those documents and could proceed without surviving a motion to dismiss, they should have filed in state court and they should not have filed federal securities claims. The fact is to the extent there is a challenge here, it's because of the way Plaintiffs chose to proceed. That choice does not somehow create undue prejudice. Essentially what Plaintiffs are saying here is that they should be allowed to overcome the PSLRA stay simply by virtue of bringing these claims here, which is exactly the opposite of what the statute says.

THE COURT: I mean Lusk in particular cited to, so does statute asserted to be somewhat akin to Section 262 and noted that that does provide another remedy for a shareholder alleging that a share price offered in the proposed transaction is unfair. You particularly said Section 262 is one of these other options. Can you walk through for me how you would say look, this is the way that process would work and admittedly a different process, one that may have up sides or down sides, but it's an option? Tell me why you cited that option and tell me why it's something I should consider in the same way that the Lusk court considered that Minnesota statute?

MS. OSWELL: Certainly. It is the predominant other option that shareholders in Delaware have. It's disclosed in the proxy. The process is disclosed in the proxy. Shareholders have full rights to proceed under that statute if they think that there is something improper about this case. And again, that's another alternative in addition to claims that are being litigated on their behalf with

the benefit of this information in New York. So they have multiple options. And I mean, many courts in Delaware, you know, permit or the appraisal statute in Delaware is a standard way that Plaintiffs presented with a situation that the Plaintiffs here claim may arise, where they feel that the merger is unfair, proceed. It is the ultimate remedy. And to kind of go back to the statute, that's not the standard here. The undue prejudice question isn't do you have another available remedy. It's certainly something to consider. And the fact that there are multiple other avenues here and multiple other ways the Plaintiffs could proceed with these claims, even these Plaintiffs here, had they chosen to litigate this case more actively instead of filing a complaint that they knew was inadequate and doing nothing else other than moving to try to lift the stay without doing the things that are required to essentially warrant lifting the stay, those avenues certainly negate undue prejudice. But the absence of those avenues is in itself not undue prejudice, it is the circumstance of the PSLRA stay as it was

intended by Congress.

THE COURT: Okay. I've asked a lot of questions. Let me let you -- you have about five, little more than five minutes left. Let me let you make some other points that you want to make.

MS. OSWELL: Your Honor, I think we've probably covered most of them. The key points here are we have to go back to the statute. Plaintiffs have made a number of arguments relating to the claims that they'd like to bring, the arguments that they might bring in a preliminary injunction motion. They haven't done what the statute requires in order for them to obtain discovery. It is not consistent with the statute's purpose.

THE COURT: But you cited that it's language, I think, from Dimple, relying on the prior EPA case suggesting that in both these extraordinary circumstances, that kind of language isn't really found in the statute, may not be applicable here. Do you have a response?

MS. OSWELL: It's how the courts have interpreted that language, based, I

believe, on the kind of different considerations that are required, including the intent of Congress and the undue prejudice. Looking at those two factors, I think that results in a situation where it requires something extraordinary, meaning out of the ordinary. This case could not be more ordinary. In fact, it is one of multiple strike suits that are filed like this upon the announcement of every merger of any size. This is perfectly ordinary. So the extraordinary standard, yes, it is what courts have said, it is based on the analysis under the statute. Perhaps it's a bit of a shorthand, but that's the right way to look at it. And Plaintiffs are nowhere near that here.

And it's the Plaintiff's burden. It's a heavy burden and I think that that is evidence in the extraordinary circumstances standard. And we've cited in our briefs, there are multiple cases that Your Honor has discussed and some that we've said in our briefs where courts refused to lift the stay even where Plaintiff's are not actively litigating another case in another forum raising similar claims

with the documents that Plaintiffs claim they need here. So it's even more so in this case that there is no undue prejudice. It isn't extraordinary, because these claims are being litigated elsewhere. And I would say that the stay and the kind of intent behind the stay is particularly important here where we have a complaint that Plaintiffs have essentially admitted will not survive a motion to dismiss and they have not bothered to amend. Putting aside whether we could get through a motion to dismiss briefing schedule kind of in time and I would say in my experience we could if we needed to, they haven't taken any of the steps that we required to make that argument, to make the argument that well, we can't get through it, because they haven't filed that amended complaint despite having over three weeks with the definitive proxy.

There is simply no undue prejudice and I think the key thing here, as many courts have explained, is the fact of being disadvantaged, even disadvantaged with respect to other plaintiffs by virtue of the stay is not

undue prejudice. It is prejudice arising from the statute exactly as it was designed. And as you've said, there are a multitude of other ways that shareholders may and in fact are pursuing their rights here to the extent that there is some issue with the disclosure.

Moving on, the one thing that the Court asked and I think that the Plaintiffs have focused on is the notion that well, there aren't that many documents, so what's the big deal here? And you know, the Court in American Funds recognized that there is prejudice and there would be particularly here given the circumstances of this very ordinary case. In rejecting essentially the statute's purpose and saying that Plaintiffs get discovery here and going against the statute, there is prejudice to the Defendants. And the real issue, the real answer is that it's irrelevant, as courts like Sarantagus in the Northern District of Illinois and CrayCos in the Southern District of New York said it doesn't matter whether there's five documents or 5,000 documents, it just doesn't matter because that's the question asked by the

statute. The statute doesn't say you can't get a lot of discovery, you can't get millions of pages. It contains no exception based on burden.

As I've said it would be exceptional to lift the PSLRA stay under these circumstances. The fact that the stay is of difficulty to Plaintiffs is a direct result of Congress's decision to enact the statute and of Plaintiffs litigation choices all along the way from filing the complaint in this venue to not filing an amended complaint upon the filing of a definitive proxy, to choosing to delay their opposition to our motion to dismiss.

THE COURT: Okay. I guess last question, Ms. Oswell, for you is on the particularization issue. In your brief you asserted the lack of particularization request. There are some cases that go different ways as to whether a request for all documents produced in the state court litigation is sufficiently particular. Sometimes it seems like the reason why those cases go one way or the other is not so much whether all documents in the state court

litigation is requested but really what's the nature of that production, how big is it, how tailored is the request, et cetera. We are talking about, sounds like undisputed here, a small number of documents. Are you still making the case that you think the the request is insufficiently particularized in light of that fact?

MS. OSWELL: Yes, Your Honor. And I agree that there are cases that go both ways and this can be looked at in a number of ways. It's not particularized here because until Plaintiff's counsel got up to argue, they hadn't explained any way in which these documents helped them with their preliminary injunction motion. And as I said, we still dispute whether that's correct, that they need the documents for it. So it's not particularized in that way. And Plaintiffs haven't met their burden to explain why they need these documents. So it's not that it's not particularized because we can't identify the set of documents. I think the cases that come out our way would also agree that they know what the universe of documents

are. It is things that have been produced in other litigations, it's that it's not specific to the claims at issue here. And until Plaintiff's counsel's argument, we hadn't heard anything on that with any specificity.

THE COURT: Okay. Thank you. Let me give Mr. Farrell five minutes for rebuttal.

MR. FARRELL: Yes, Your Honor. Just to make a few brief points. To the particularized point, I thought it was interesting that we heard no explanation of what potential contents are in these documents that somehow makes them irrelevant to our specific disclosure claims. And as I've been through, I think they are directly relevant. I also draw the Court's attention back again to the Kneiting decision, which is very similar to us here, where it is an M&A case, there was the preliminary injunction that was sought. They argued that the appraisal remedy was adequate. And I can tell you, I've personally seen clients walk away, because they didn't have sufficient information, just like whether to seek appraisals, because there's risk, downside risk

in that. And I hear counsel's point that, you know, it's wrongly decided in their view because it relied on a pre PSLRA decision. But if you look at the decision, the Court says that this time constraint, they're referring to the time constraint of about 30 days for a motion to dismiss to be decided before the vote, coupled by a showing of potential irreparable harm, militates in favor of the order for limited and discrete discovery regarding DLP's financial projections, a disclosure issue that troubles the Court. And irreparable harm is key here, because the case law teaches that irreparable harm is a higher standard than undue prejudice under the PSLRA, so I think that decision is completely on all fours with our situation here.

And finally, I simply ask that the Court, regardless of how Your Honor rules on the motion today, set a day for a preliminary injunction hearing.

THE COURT: Okay. And let's talk about that issue in just a second.

MR. FARRELL: Sure.

THE COURT: Mr. Farrell. Thank

you for your argument and you can be seated and I'll ask some questions about logistics, but I won't require counsel to come forward to the podium here. If you just stand, that will be sufficient to make sure our court reporter can hear your voice well.

Okay. We've got a motion to expedite discovery. I've heard argument. I'm going to make a decision this week on that and I'll get that to you as quickly as I can. One way or the other, though, we've got a, as I understand it, shareholder vote set for March 23rd and we've got a Plaintiff who has indicated they are going to file a preliminary injunction motion. And I think first question on the Plaintiff's side and to Mr. Farrell, is regardless of which way the Court goes on this expedited discovery motion, are we to expect a preliminary injunction motion from the Plaintiff?

MR. FARRELL: Yes, Your Honor.

THE COURT: Same question is to setting a preliminary injunction hearing in the schedule. I can't think of the circumstance off

the top of my head where a court has actually set a preliminary injunction hearing as to a preliminary injunction motion that hasn't been filed, so I'm not prepared to do that today. All that said, I don't think there's any other hurdle here that relates to that issue other than this motion which I'm going to decide this week. So I think what I would suggest to the parties is that you meet, you discuss, confer and discuss, starting now, what is a schedule going to look like here. You know, one way or the other, assume the motion is denied on the one hand, when are we going to see a preliminary injunction motion? What's the briefing schedule going to look like that would tee this up for a hearing and a decision, not only in advance of the March 23rd vote, but also sufficiently in advance, because Judge Stark has indicated to me that he wants me to decide this issue. There is a right to objection and it might be very truncated, but they will be the prospect if the side that loses to have the ability to object to him. And that has to be accounted for in this time frame which is about a month. And so for

now I guess all I'm saying is counsel are going to have to discuss what's the schedule going to look like, how is it going to be manageable and be prepared to act, you know, on that quickly given the time frames that we're talking about. Does that make sense, Mr. Farrell?

MR. FARRELL: That makes sense. If Your Honor could give us any guidance on how much time you would like for the objection period that would be, I think, helpful for both parties.

THE COURT: It's not going to be able to be anything close to the normal period for objections, which, for example, looks like it's 14 days under the rules, but you get the extra three days. Our electronic filing rules typically give people an extra three days, so you're talking about 17 days for objection and 17 days for a ruling. Obviously that's never going to happen. So I mean, look, I'm speaking for the District Court here, but I think if you want to have the ability to make an objection to the decision, you know, you're probably going to need to leave at least, you know, at least five

days. And by five days, I probably mean five working days for the process of, you know, well -- for the process of some way for the parties to articulate their views as to why an objection is risk well taken and for the District Court to make a quick decision on that. I mean, I think the reality is more time would be better, but the Court would need at least a week for that process to happen in very short order. I may end up making -- depending on how truncated the schedule is, I may end up making the decision on the preliminary injunction motion at the end of the hearing itself from the bench, or maybe, you know, extremely quickly thereafter. So I guess what I'm saying on my part and I'm sure on Chief Judge Stark's part, the Court will act as quickly as it needs to act, but we need to have a schedule that at least allows for this process to play out in an informed way. So I'm just asking the parties to begin to discuss those issues, because this will all be happening in short order. Does that make sense?

MR. FARRELL: Makes perfect sense.

Thank you.

THE COURT: Ms. Oswell, does that make sense?

MS. OSWELL: Yes, Your Honor.

THE COURT: I guess, Mr. Farrell, the other issue is, I may be off on this, but here's what I take to be the gist of what Defendant is saying, is look, this complaint is based on, in part, of asserted admissions or misleading statements in a preliminary proxy and based on the idea that these shareholders are going to vote, they can't understand what the vote should be able to understand about this, you know, now we've got a definitive proxy filed, but no amended complaint. And I guess I think part of the Defendant's assertion here is how can we be having a preliminary injunction and a decision as to problems with a preliminary proxy that the shareholder, if it's not the final proxy that the shareholders are actually going to be responding to, wouldn't we have to be talking about what the state of affairs is in the definitive proxy? If that's so, I think some of your briefing here suggests maybe it is

so, how are you going to accomplish teeing those definitive proxy related issues up in the context of this truncated schedule?

MR. FARRELL: Sure. If Your Honor would prefer, I'm sure we could probably get an amended complaint as soon as tomorrow. The definitive proxy narrows some of the issues, because there are additional disclosures, as I believe Defendants point on their briefing. They relate to an advisor and so it's a pretty narrow issue. It's a lot of disclosure, but it's a narrow issue that's raised in the complaint. So we could, I think very quickly, turn that around if Your Honor would prefer that approach.

THE COURT: Yeah, I mean, because I don't know, sounds like maybe you can tell me, if the Plaintiff wasn't talking about the definitive proxy, if we were arguing at this preliminary injunction phase simply about what's in the preliminary proxy, is part of your argument going to be something like these issues are at least in part are moot or something relating to that?

MS. OSWELL: It would be both, that they are moot and as a matter of law you cannot state a claim under Section 14A based on a preliminary proxy, so there is nothing really to discuss.

THE COURT: So if the Plaintiff wants to try to take those arguments off the table, it's going to need to be focusing on any complaint that in turn focuses on a definitive proxy and arguments about why under the securities laws that definitive proxy fails under the PSLRA from your perspective?

MS. OSWELL: Yes, Your Honor.

THE COURT: Sounds like, Mr. Farrell, you're not disagreeing necessarily, that you're saying, yeah, we can get an amended complaint on file very quickly.

MR. FARRELL: That's exactly what I'm saying, Your Honor.

THE COURT: Then I'd suggest you do that. So that from here on out this schedule that gets drafted relates to what's really at issue. Okay. Is there anything further logistically that we need to take up to make

sure that we can move through this process, Mr. Farrell, from the Plaintiff's perspective?

MR. FARRELL: Nothing else from my perspective, Your Honor.

THE COURT: Mrs. Oswell, from the Defendant's perspective?

MS. OSWELL: No, Your Honor.

THE COURT: Okay. I appreciate counsel's arguments today. For our out of town folks, wish you safe travels. And as I said, I'll get you a decision shortly and the Court will stand in recess. Thank you.

(End at 10:46 a.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Stacy M. Ingram, Certified Court Reporter and Notary Public, do hereby certify that the foregoing record, Pages 1 to 72 inclusive, is a true and accurate transcript of my stenographic notes taken on February 24, 2016, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of February 2016, at Wilmington.

/s/ Stacy M. Ingram

Stacy M. Ingram, CCR

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